



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 31, 2003

Mr. Dan Junell
General Counsel
State Board for Educator Certification
4616 West Howard Lane, Suite 120
Austin, Texas 78728

OR2003-2179

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177938.

The State Board for Educator Certification ("SBEC") received a request for any state-issued certificates or certifications and documents reflecting disciplinary action taken in regard to a named individual. You advise that the requestor is the agent for a local government body with whom SBEC is willing to share certain information, and therefore, you are disclosing most of the requested information pursuant to an intergovernmental transfer. *See* Attorney General Opinions H-836 (1976), H-242 (1974), M-713 (1970); Open Records Decision Nos. 655 (1997), 414 (1984) (information may be transferred between governmental bodies without violating its confidential character on basis of need to maintain an unrestricted flow of information between governmental bodies). You state that SBEC wishes to withhold a portion of the remaining requested information from the requestor under section 552.101 of the Government Code. This office also received arguments from Schwartz & Eichelbaum, a law firm representing the San Angelo Independent School District (the "district"), in relation to some of the requested information. *See* Gov't Code § 552.304 (providing that member of public may submit written comments stating why information at issue in request for attorney general decision should or should not be released). We have considered the exceptions claimed and have reviewed the submitted representative sample of information.¹

¹ We assume that the "sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

As an initial matter, we note that SBEC has submitted letters to this office as responsive to the request which Schwartz & Eichelbaum claim are excepted from disclosure under the attorney-client privilege. We note that this information was not submitted to this office within the fifteen business day period prescribed by section 552.301(e) of the Government Code. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). A compelling reason under section 552.302 may be demonstrated for attorney-client privileged communications if it is shown that the release of the information would harm a third party. Open Records Decision No. 676 at 12 (2002). Thus, we will address the arguments submitted for the district in relation to this information.

We first address your arguments submitted in relation to the social security number belonging to the individual named in the request for information. Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. SBEC contends that the social security number contained in the submitted records is made confidential under section 56.001 of the Occupations Code, which provides as follows:

The social security number of an applicant for or holder of a license, certificate of registration, or other legal authorization issued by a licensing agency to practice in a specific occupation or profession that is provided to the licensing agency is confidential and not subject to disclosure under Chapter 552, Government Code.

Occ. Code § 56.001. You explain that the social security number at issue belongs to an individual who holds an educator's certificate issued by SBEC. Accordingly, we find that the social security number falls under section 56.001 of the Occupations Code, as encompassed by section 552.101. Therefore, SBEC may withhold this information. Because we are able to make this determination, we need not address Schwartz & Eichelbaum's claim under section 552.101 in conjunction with the federal Social Security Act.

We next note that on behalf of the district, Schwartz & Eichelbaum seeks to withhold portions of the information it has submitted to this office. However, the information submitted by Schwartz & Eichelbaum includes information that is not contained in the information submitted by SBEC for review. Therefore, this ruling does not address this information or the firm's claimed exceptions in relation to this information, and is limited to the information submitted as responsive by SBEC. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested, or representative sample if voluminous amount of information was requested).

We now turn to the district's claim under the attorney-client privilege. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must

explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein). Upon review of the submitted letters that the district seeks to withhold under section 552.107, we conclude that these letters come within the attorney-client privilege. However, as these letters were released to SBEC, we must determine whether the privilege has been waived. Rule 511 of the Texas Rules of Evidence provides that

[a] person upon whom these rules confer a privilege against disclosure waives the privilege if:

(1) the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged; or

(2) the person or a representative of the person calls a person to whom privileged communications have been made to testify as to the person's character or character trait insofar as such communications are relevant to such character or character trait.

Rule 512 of the Texas Rules of Evidence provides that “[a] claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.” Schwartz & Eichelbaum do not argue that SBEC is a privileged party to the communications. Rather, they claim that the submitted letters are confidential attorney-client communications that retained their confidentiality when they were provided to SBEC pursuant to an intergovernmental transfer, and thus, the privilege has not been waived. This office has concluded that information subject to the Act may be transferred between governmental bodies without waiving exceptions to the public disclosure of that information or affecting its confidentiality. *See Attorney General Opinion JM-590* (1986); *Open Records Decision Nos. 655* (1997), *567* (1990), *561* (1990), *516* (1989). These decisions are based on the well-settled policy of this state that governmental agencies should cooperate with each other in the interest of the efficient and economical administration of their statutory duties. *See Open Records Decision No. 516* (1989). However, in this case, we find that, as SBEC was seeking the information from the district as a regulator, and as the district provided the

information as a regulated entity, the purposes of the intergovernmental transfer doctrine are not present in this case. Therefore, we find that the intergovernmental transfer doctrine is inapplicable in this instance.

We note that Schwartz & Eichelbaum also asserts that SBEC had the authority to obtain the information at issue pursuant to section 249.14(a) of title 19 of the Administrative Code. If in fact SBEC had the authority to compel the district to release the information at issue to SBEC, then there would be no waiver of the privilege. *See* TEX. Rule Evid. 512. Under chapter 21 of the Education Code, SBEC has the authority to regulate and oversee all aspects of the certification, continuing education, and standards of conduct of public school educators. *See* Educ. Code § 21.031(a). SBEC may “provide for disciplinary proceedings, including the suspension or revocation of an educator certificate, as provided by Chapter 2001, Government Code.” Educ. Code § 21.041(b)(7). Section 21.041(a) provides that SBEC may adopt rules as necessary for its own procedures. Further, a school district may obtain from any law enforcement or criminal justice agency all criminal history record information that relates to a person the district seeks to employ or who intends to serve as a volunteer. Educ. Code § 22.083(a). Likewise, SBEC “shall obtain from any law enforcement or criminal justice agency all criminal history record information that relates to an applicant for or holder of a certificate issued under . . . Chapter 21.” Educ. Code § 22.082. Under section 22.083(d), the superintendent of a school district shall promptly notify SBEC in writing if the superintendent obtains or has knowledge of information showing that an applicant for or holder of a certificate issued under Chapter 21 has a reported criminal history.

SBEC states that it is entitled to obtain the information at issue from the district pursuant to regulations found at section 249.14 of title 19 of the Texas Administrative Code. These regulations provide in relevant part:

- (a) Staff may obtain and investigate information concerning alleged improper conduct by an educator, applicant, examinee, or other person subject to this chapter that would warrant the board denying relief to or taking disciplinary action against the person or certificate.

....

(c) The executive director and staff may also obtain and act on other information providing grounds for investigation and possible action under this chapter.

(d) A person who serves as the superintendent of a school district or the director of an open-enrollment charter school, private school, regional education service center, or shared services arrangement shall promptly notify in writing [SBEC] by filing a report with the executive director within seven calendar days of the date the person first obtains or has knowledge of information indicating any of the following circumstances:

(1) that an applicant for or a holder of a certificate has a reported criminal history;

(2) that a certificate holder was terminated from employment based on a determination that he or she committed any of the following acts:

(A) sexually or physically abused a minor or engaged in any other illegal conduct with a minor;

(B) possessed, transferred, sold, or distributed a controlled substance;

(C) illegally transferred, appropriated, or expended school property or funds

(e) A report filed under subsection (d) of this section shall, at a minimum, summarize the factual circumstances requiring the report and identify the subject of the report by providing the following available information: name and any aliases; certificate number, if any, or social security number; and last known mailing address and home and daytime phone numbers. A person who is required to file a report under subsection (d) of this section but fails to do so timely is subject to sanctions under this chapter.

19 T.A.C. § 249.14.

Under 19 T.A.C. § 249.15(c), SBEC may order disciplinary action against a person or certificate over which the board has jurisdiction upon a determination based on satisfactory evidence that: (4) the person has failed to report or has hindered the reporting of child abuse or the known criminal history of an educator as required by law and § 249.14 of this title... or (6) the person has failed to cooperate as provided by law with the agency in an investigation commenced under this chapter. 19 T.A.C. § 249.15(c)(4), (6).

You have indicated that SBEC's investigation of the individual named in the instant request began when the district provided SBEC with information in accordance with section 22.083(d). Therefore, it appears that the district complied with the reporting requirements under sections 22.083 of the Education Code and 249.14(d) and (e) of title 19 of the Administrative Code. SBEC subsequently requested information from the district regarding the district's investigation of this individual. However, upon review of the statutes and regulations that you have cited, and upon additional conversation with you, we are unable to find legal authority for SBEC to compel the district to provide the information for which the district claims the attorney-client privilege.

Thus, in light of our conclusions that the intergovernmental transfer rule does not apply in this instance, and that SBEC did not have the specific legal authority to compel the disclosure of the information at issue, we find that the district believed it was compelled to release the information at issue erroneously. Therefore, we conclude that under Rule 512, the district did not waive its attorney-client privilege. Accordingly, we conclude that the information at issue is excepted under section 552.107 of the Government Code.

In summary, you may withhold the social security number contained in the submitted documents under section 552.101 of the Government Code in conjunction with section 56.001 of the Occupations Code. The submitted letters that the district claims are privileged are excepted from disclosure under section 552.107. The remaining submitted information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

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§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Kristen Bates", with a long horizontal flourish extending to the right.

Kristen Bates
Assistant Attorney General
Open Records Division

KAB/lmt

Ref: ID# 177938

Enc. Submitted documents

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